2003

Donner Crest, Condominuim Homeowners' Association and Oakcrest Condominium Homeowners' Association v. Salt Lake City, a municipal corporation and the Van Cott, Bagley, Cornwall and McCarthy 401(k) Profit Sharing Plan : Brief of Appellee

Utah Court of Appeals

Alexander Dushku; Kirton & McConkie; Gregory M. Simonsen, Jason K. Nelson; Rinehart, Simonsen & Fetzer; attorney for appellants.
Robert E. Mansfield, Stephen K. Christiansen; Van Cott, Bagley, Cornwall & McCarthy; Lynn H. Pace; attorneys for appellee.

IN THE UTAH COURT OF APPEALS

DONNER CREST CONDOMINIUM HOMEOWNERS' ASSOCIATION and OAKCREST CONDOMINIUM HOMEOWNERS' ASSOCIATION, Petitioners and Appellants, vs. SALT LAKE CITY, a municipal corporation and THE VAN COTT, BAGLEY, CORNWALL & McCARTHY 401(K) PROFIT SHARING PLAN, Respondents and Appellees.	Case No. 020030991-CA

BRIEF OF APPELLEE

Appeal from a Final Judgment of the Third Judicial District Court,
In and for Salt Lake County, Judge William Bohling

Alexander Dushku
Kirton & McConkie
60 East South Temple, Suite 1800
P.O. Box 45120
Salt Lake City, Utah 84145-0120

Robert E. Mansfield
Stephen K. Christiansen
Van Cott, Bagley, Cornwall & McCarthy
50 South Main Street, Suite 1600
P.O. Box 45340
Salt Lake City, Utah 84145-0340
Attorneys for Appellee The Van Cott, Bagley, Cornwall & McCarthy 401(K) Profit Sharing Plan

Gregory M. Simonsen
Jason K. Nelson
Rinehart, Simonsen & Fetzer
4 Trial Center
305 West North Temple, Suite 800
Salt Lake City, Utah 84180
Attorneys for Appellants

Lynn H. Pace
Salt Lake City Law Department
451 South State Street, Suite 505A
Salt Lake City, Utah 84111
Attorney for Appellee Salt Lake City

ORAL ARGUMENT NOT REQUESTED

IN THE UTAH COURT OF APPEALS

DONNER CREST CONDOMINIUM HOMEOWNERS' ASSOCIATION and OAKCREST CONDOMINIUM HOMEOWNERS' ASSOCIATION, Petitioners and Appellants, vs. SALT LAKE CITY, a municipal corporation and THE VAN COTT, BAGLEY, CORNWALL & McCARTHY 401(K) PROFIT SHARING PLAN, Respondents and Appellees.	Case No. 020030991-CA

BRIEF OF APPELLEE

Appeal from a Final Judgment of the Third Judicial District Court,
In and for Salt Lake County, Judge William Bohling

Alexander Dushku
Kirton & McConkie
60 East South Temple, Suite 1800
P.O. Box 45120
Salt Lake City, Utah 84145-0120

Robert E. Mansfield
Stephen K. Christiansen
Van Cott, Bagley, Cornwall & McCarthy
50 South Main Street, Suite 1600
P.O. Box 45340
Salt Lake City, Utah 84145-0340
Attorneys for Appellee The Van Cott, Bagley, Cornwall & McCarthy 401(K) Profit Sharing Plan

Gregory M. Simonsen
Jason K. Nelson
Rinehart, Simonsen & Fetzer
4 Trial Center
305 West North Temple, Suite 800
Salt Lake City, Utah 84180
Attorneys for Appellants

Lynn H. Pace
Salt Lake City Law Department
451 South State Street, Suite 505A
Salt Lake City, Utah 84111
Attorney for Appellee Salt Lake City

ORAL ARGUMENT NOT REQUESTED

TABLE OF CONTENTS

I. JURISDICTION 1

II. ISSUE PRESENTED FOR REVIEW 1

III. IMPORTANT STA TUTORY PROVISIONS 2

IV. STATEMENT OF THE CASE 2

A. NATURE OF THE CASE 2

B. COURSE OF PROCEEDINGS 3

C. REPLY TO DONNER CREST'S STATEMENT OF FACTS 3

V. SUMMARY OF THE ARGUMENT 3

VI. ARGUMENT 5

A. DONNER CREST FAILED TO SUFFICIENTLY PRESERVE FOR APPEAL ARGUMENTS WHICH it NOW ATTEMPTs TO ADVANCE 5

B. THE STATE ACT GRANTS MUNICIPALITIES BROAD POWER TO ZONE AND TO REGULATE LAND USES. 8

C. VAN COTT WAS NOT REQUIRED TO OBTAIN A VARIANCE FROM THE BOARD OF ADJUSTMENT 17

VII. CONCLUSION 19

TABLE OF AUTHORITIES

Cases

Badger v. Brooklyn Canal Co., 966 P.2d 844 (Utah 1998) 6

Brookside Mobile Home Park, Ltd. v. Peebles, 2002 UT 48, 48 P.3d 968 6

Crestview-Holladay Homeowners Association, Inc. v. Engh Floral Co., 545 P.2d 1150 (Utah 1976) 15

Harmon City, Inc. v. Draper City, 997 P.2d 321(Utah App. 2000) 2

Hart v. Salt Lake County Comm., 945 P.2d 125 (Utah App. 1997) 6

LeBaron & Associates, Inc. v. Rebel Enterprises, Inc., 823 P.2d 479 (Utah App. 1991) .. 6

Marshall v. Salt Lake City, 141 P.2d 704 (Utah 1943) 1

Ohline Corp. v. Granite Mill, 849 P.2d 602 (Utah App. 1993) 6

Saunders v. Sharp, 793 P.2d 927 (Utah App. 1990) 14

Springville Citizens for a Better Cmty. v. City of Springville, 1999 UT 25, 979 P.2d 3321

State v. Irwin, 924 P.2d 5 (Utah App. 1996) 5, 6

Stevens v. Essex Junction Zoning Bd., 428 A.2d 1100 (Vt. 1981) 14

Wilkins v. City of San Bernardino, 175 P.2d 542 (Cal. 1946) 15

Young v. Salt Lake City School Dist., 2002 UT 64, 52 P.3d 1230, 1233 (Utah 2002) 2

Statutes

Utah Code Ann. § 10-9-1001(3) 2

Utah Code Ann. § 10-9-101 8

Utah Code Ann. § 10-9-102 ..... 2, 9

Utah Code Ann. § 10-9-201 10

Utah Code Ann. § 10-9-204 ..... 2, 10

Utah Code Ann. § 10-9-401 9

Utah Code Ann. § 10-9-403 9

Utah Code Ann. § 10-9-407 9

Utah Code Ann. § 10-9-707 18

Utah Code Ann. § 78-2a-3 1

Other Authorities

Black's Law Dictionary 24 (7th Ed. 1999) 14

David A. Thomas & James H. Backman, Thomas and Backman on Utah Real Property Law, § 4.04(a), p. 173 (1999) 16

S.L.C. Code § 2.20.010 10

S.L.C. Code § 21A.06.030 ..... 10, 11

S.L.C. Code § 21A.54.010 10

S.L.C. Code § 21A.54.150 ..... 10, 11, 13, 14

S.L.C. Code § 21A.54.150(A) 10

S.L.C. Code § 21A.54.150(C) 11, 13

S.L.C. Code § 21A.62.040 15

Rules

Utah R. App. 29 20

Utah R. App. Proc. 24 ..... 5, 6

I. JURISDICTION

The Utah Court of Appeals has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2).

II. ISSUE PRESENTED FOR REVIEW

Whether the Salt Lake City Planning Commission acted within its lawfully delegated powers in granting a conditional use permit to the Van Cott, Bagley, Cornwall & McCarthy 401(K) Profit Sharing Plan ("Van Cott") to build a planned development on the subject property owned by Van Cott.

Failure to Preserve for Appeal: Appellants Donner Crest Condominium Homeowners' Association and Oakcrest Condominium Homeowners' Association ("Donner Crest") present several arguments for the first time in their brief to this Court. Donner Crest's failure to present these arguments prior to this appeal precludes this Court from hearing them. As detailed more fully below, Donner Crest failed to preserve the issues of whether the Van Cott property is a valid candidate for a PUD, and whether the City's PUD provisions are illegal as applied to this case.

Standard of Appellate Review: If a zoning plan "could promote the general welfare; or even if it is reasonably debatable that it is in the interest of the general welfare, that act should be upheld." Marshall v. Salt Lake City, 141 P.2d 704, 709 (Utah 1943). "A municipality's land use decisions are entitled to a great deal of deference." Springville Citizens for a Better Cmty. v. City of Springville, 1999 UT 25, ¶ 23, 979 P.2d 332, 336 (citations omitted). Courts are required to "(a) presume that land use decisions and regulations are valid; and (b) determine only whether or not the decision is arbitrary,

capricious, or illegal." Utah Code Ann. § 10-9-1001(3). "Although section 10-9-1001 expressly applies only to the district court, the standard for . . . review [by the Court of Appeals]. . . is the same standard established in the Utah Code for the district court's review." Harmon City, Inc. v. Draper City, 997 P.2d 321, 323 n.3 (Utah App. 2000) (internal quotations omitted; citations omitted). This Court examines legal conclusions, including statutory interpretation, for correctness. See, e.g., Young v. Salt Lake City School Dist., 2002 UT 64, ¶ 10, 52 P.3d 1230, 1233 (Utah 2002).

III. IMPORTANT STATUTORY PROVISIONS

In addition to the statutes provided by Donner Crest in its brief, Van Cott includes the following provisions in Addendum–1 ("Add.-1"):

1. Utah Code Ann. § 10-9-102. Add.-1 at 1.
2. Utah Code Ann. § 10-9-204. Add.-1 at 1.
3. Utah Code Ann. § 10-9-1001. Add.-1 at 1.

IV. STATEMENT OF THE CASE

A. NATURE OF THE CASE

The true dispute in this case centers around whether Salt Lake City's comprehensive zoning ordinance (the "Zoning Ordinance") was legally applied in this case to grant Van Cott a conditional use permit for its planned development. While presenting an informative overview on land use law, Donner Crest fails to present any legal argument tending to show that the Planning Commission acted outside the scope of its authority, or that the City Council lacked the authority to delegate such power to the Planning Commission. Further, Donner Crest's arguments that the Van Cott parcel does not qualify for planned development, and that the City's planned development scheme as

applied is illegal, are presented for the first time in this case on appeal. As such, this Court should not entertain the arguments, but should affirm the decision of the district court.

B. COURSE OF PROCEEDINGS

Van Cott generally agrees with the statement of Donner Crest regarding the proceedings up to this point, as detailed more fully in Donner Crest's brief. Br. of Appellant p. 3-4.

C. REPLY TO DONNER CREST'S STATEMENT OF FACTS

Van Cott assumed only for the limited purposes of the court's ruling on its Motion for Summary Judgment that the facts alleged in Donner Crest's Amended Complaint were true. R. 168.

V. SUMMARY OF THE ARGUMENT

In this appeal, Donner Crest argues that the decision of the trial court, which affirmed the decisions reached by the Salt Lake City Planning Commission and the Salt Lake City Land Use Appeals Board, should be second-guessed. Donner Crest advances a variety of broad reasons for this untenable position. Donner Crest's arguments should be rejected.

First, Donner Crest failed to raise all these issues below. Donner Crest's arguments that the Van Cott property does not qualify as a planned development and that the City's planned development provision is illegal are raised here for the first time. These issues should be dismissed out-of-hand by this Court as not properly preserved and raised.

Second, the actions of the Planning Commission in approving the Van Cott planned development application was proper in all respects and was done pursuant to statutorily granted powers. The Planning Commission properly granted a conditional use pursuant to the purposes and specific provisions of the governing state Act and municipal Code. The Planning Commission made detailed findings to which this Court must defer with respect to the property in question. Those findings comply with every relevant provision of law. The conditional use provisions allow the Planning Commission to "change, alter, modify or waive" any provision of the zoning ordinance or the City's subdivision regulations to achieve the purposes for which a planned development may be approved. The Van Cott property plainly falls within the definition of a planned development under the Salt Lake City ordinance. This is not, as Donner Crest argues, "illegal spot zoning" as it does not constitute a use classification materially different and inconsistent with the surrounding area.

Finally, Van Cott was not required to obtain a separate variance from the Board of Adjustment. The Planning Commission modified the frontage requirement pursuant to its lawfully delegated authority in approving a planned development under the zoning ordinance. A variance is required if a party seeks to develop property *outside* the strictures of the zoning ordinance. Because the Van Cott planned development was authorized by the comprehensive zoning ordinance, a variance was not required. Donner Crest provides no governing authority to the contrary to support this indefensible position.

For each of these reasons, the decision below should be affirmed.

VI. ARGUMENT

The Planning Commission's actions in approving the Van Cott planned development is proper in all respects. The Van Cott property is a proper candidate for a PUD and the Planning Commission acted within its statutorily granted powers in approving Van Cott's application for a conditional use permit.

A. DONNER CREST FAILED TO SUFFICIENTLY PRESERVE FOR APPEAL ARGUMENTS WHICH IT NOW ATTEMPTS TO ADVANCE.

Donner Crest failed to raise issues before the trial court which it now attempts to advance in this Court. It is for the first time on appeal that Donner Crest asserts at least two arguments: (1) the Van Cott property and project do not qualify as a planned development and (2) as applied to the facts of this case, the City's PUD provision is illegal. See Br. of Appellant p. 30-37. Such an attempt is not allowed under either the Rules of Appellate procedure or Utah case law.

Courts in Utah have long held that a party "who fails to bring an issue before the trial court is generally barred from raising it for the first time on appeal." State v. Irwin, 924 P.2d 5, 7 (Utah App. 1996). Furthermore, the Utah Rules of Appellate Procedure require that Donner Crest provide in its brief "citation to the record showing that the issue was preserved in the trial court; or a statement of grounds for seeking review of an issue not preserved in the trial court." Utah R. App. Proc. 24(a)(5)(A) and (B). "[E]ach issue presented for review in an appellant's brief must cite to the record, showing that the issue was preserved in the trial court or, if it was not preserved, then appellant must set forth

the grounds permitting appellate review. State v. Irwin, 924 P.2d at 7 n. 2 (citing Utah Rule App. Proc. 24(a)). This Court has long held that:

> To preserve a substantive issue for appeal, a party must timely bring the issue to the attention of the trial court, thus providing the court an opportunity to rule on the issue's merits. "Issues not raised in the trial court in timely fashion are deemed waived, precluding [the appellate court] from considering their merits on appeal."

Hart v. Salt Lake County Comm., 945 P.2d 125, 130 (Utah App. 1997) (bracket in original) (citing Ohline Corp. v. Granite Mill, 849 P.2d 602, 604 n.1 (Utah App. 1993)).

Utah courts have set forth three specific factors for determining whether an issue was preserved for appeal: "(1) the issue must be raised in a timely fashion; (2) the issue must be specifically raised; and (3) a party must introduce supporting evidence or relevant legal authority." Brookside Mobile Home Park, Ltd. v. Peebles, 2002 UT 48, ¶ 14, 48 P.3d 968, 972 (citing Badger v. Brooklyn Canal Co., 966 P.2d 844, 847 (Utah 1998)). The mere assertion of an issue is not sufficient to preserve the issue for appeal. As previously explained by this Court, "[f]or an issue to be sufficiently raised, even if indirectly, it must at least be raised to a level of consciousness such that the trial judge can consider it." LeBaron & Associates, Inc. v. Rebel Enterprises, Inc., 823 P.2d 479, 483 (Utah App. 1991).

In its opening brief, Donner Crest has asserted for the first time that the Planning Commission's grant of a planned unit development to Van Cott was illegal in that the Van Cott property is not a proper candidate for a PUD and that the PUD statute, at least as applied to the facts of this case, is illegal. Although, Donner Crest contends that the issue of the "legality of the Planning Commission's grant of a planned development

conditional use permit was extensively argued in the summary judgment briefing below," the issue of the Van Cott property being a proper candidate and the legality of the entire PUD concept was never asserted in the trial court. Br. of Appellants p.1. As a review of the Record reveals, however, Donner Crest's sole argument in this regard until this appeal has been that only the Board of Adjustment has the authority to grant a variance from the requirements of the zoning ordinance, which Donner Crest claims this was. See R. 324-35.

A closer reading of Donner Crest's Memorandum opposing summary judgment shows that, while it made many arguments, none of the arguments made below contended that the Van Cott parcel was not fit for planned development, nor did they address the legality of the City's planned development scheme. Before the trial court, Donner Crest argued that:

(a) the Utah Code requires equal treatment of property owners within a zoning district, R. 326-27;
(b) a variance is required to deviate from the standards of the Zoning Ordinance, R. 327-29;
(c) only the Board of Adjustment is allowed to grant a variance from the requirements of the Zoning Ordinance, R. 329-30;
(d) variances may only be granted when specific findings are made, R. 330-32; and
(e) the City's attempt to empower the Planning Commission to grant variances from the Zoning Ordinance is illegal, R. 332-35.

Donner Crest did not argue before the trial court that the Planning Commission's grant of a conditional use permit was illegal. Rather, it focused its efforts on labeling the Van Cott planned development conditional use permit a variance. A court should not pass on issues argued for the first time on appeal. Donner Crest's principal arguments on

appeal, including that the Van Cott project is not a PUD candidate, and that the City's PUD provision is illegal, were never even presented to the trial court. This Court should not allow Donner Crest to avoid the requirements of the Rules of Appellate Procedure and years of case law by proposing new arguments for the first time on appeal. Neither of these arguments were raised in a timely manner to the district court. As such, this Court should not entertain Donner Crest's new arguments for the first time, but should affirm the decision of the district court.

B. THE STATE ACT GRANTS MUNICIPALITIES BROAD POWER TO ZONE AND TO REGULATE LAND USES.

The actions of the Planning Commission in approving the Van Cott planned development application was proper in all respects and was done pursuant to statutorily granted powers. In spite of Donner Crest's continued insistence that Van Cott obtained an illegal variance from the requirements of the zoning ordinance, the Planning Commission granted no variance. Rather, what it did grant to Van Cott was a conditional use permit for a planned development, in accordance with the procedures mandated by the Municipal Land Use Development and Management Act (the "State Act" or "Act"), Utah Code Ann. § 10-9-101, et seq., and the Salt Lake City ordinances.

The Act grants a municipality broad authority to enact a comprehensive zoning scheme and to regulate land uses. Section 10-9-102 provides the purpose statement of the Act:

> To accomplish the purpose of this chapter, and in order to provide for the health, safety, and welfare, and promote the prosperity, improve the morals, peace and good order, comfort, convenience, and aesthetics of the municipality and its present and future

> inhabitants and businesses, to protect the tax base, secure economy in governmental expenditures, foster the state's agricultural and other industries, protect both urban and nonurban development, and to protect property values, *municipalities may enact all ordinances, resolutions, and rules that they consider necessary for the use and development of land within the municipality*, including ordinances, resolutions, and rules governing uses, density, open spaces, structures, buildings, energy efficiency, light and air, air quality, transportation and public or alternative transportation, infrastructure, public facilities, vegetation, and trees and landscaping, unless those ordinances, resolutions, or rules are expressly prohibited by law.

Utah Code Ann. § 10-9-102 (emphasis added). The Legislature allowed for any and all enactments considered necessary by a municipality, as long as they are not expressly prohibited by the Act. This broad power granted to the City Council further evidences the Legislature's intent that municipalities be empowered to make land use decisions which the municipality considers necessary.

The Act further permits a municipality to "enact a zoning ordinance establishing regulations for land use and development that furthers the intent of" the Act. Utah Code Ann. § 10-9-401. In furtherance of a municipality's zoning ordinance, its "legislative body may amend: (i) the number, shape, boundaries, or area of any zoning district; (ii) any regulation of or within the zoning district; or (iii) any other provision of the zoning ordinance." Utah Code Ann. § 10-9-403(1)(a) (emphasis added). Finally, "[a] zoning ordinance may contain provisions for conditional uses that may be allowed, allowed with conditions, or denied in designated zoning districts, based on compliance with standards and criteria set forth in the zoning ordinance for those uses." Utah Code Ann. § 10-9-407(1). Thus, the Act foresees that a municipality will from time to time need to amend regulations within zoning districts, as well as the zoning ordinance itself.

In accordance with these grants of authority, the City Council did provide for conditional uses in its comprehensive zoning plan. "A conditional use is a use which has potential adverse impacts upon the immediate neighborhood and the City as a whole." S.L.C. Code § 21A.54.010. Further, the City Council provided for planned developments as a conditional use. "A planned development is a distinct category of conditional use. As such, it is intended to encourage the efficient use of land and resources, promoting greater efficiency and public and utility services and encouraging innovation in the planning and building of all types of development." S.L.C. Code § 21A.54.150(A).

In furtherance of the broad authority provided under the Act, and specific grants of authority, the Salt Lake City Council also provided for a planning commission. "Each municipality may enact an ordinance establishing a planning commission." Utah Code Ann. § 10-9-201. The Salt Lake City Planning Commission was established pursuant to this grant. See S.L.C. Code § 2.20.010, et seq.; see also S.L.C. Code § 21A.06.030. "The planning commission shall . . . administer provisions of the zoning ordinance, where specifically provided for in the zoning ordinance adopted by the legislative body . . . [and] exercise any other powers: (a) that are necessary to enable it to perform its function; or (b) *delegated to it by the legislative body*." Utah Code Ann. § 10-9-204(3), (8) (emphasis added). The Act clearly enables a municipality to establish a planning commission, and to delegate to that Commission very broad power and authority, as the City Council determines and delegates.

As part of the creation of the Planning Commission, the City Council empowered the Planning Commission and gave it jurisdiction and authority to "review, hear and

decide applications for conditional uses, including planned developments, pursuant to the procedures and standards set forth in Part V, Chapter 21A.54, Conditional Uses." S.L.C. Code § 21A.06.030(B)(5). In addition, the City Council specifically granted the authority to the Planning Commission to modify regulations with respect to planned developments. "In approving any planned development, the planning commission may change, alter, modify or waive any provision of this title or of the City's subdivision regulations as they apply to the proposed planned development." S.L.C. Code § 21A.54.150(C) (emphasis added.)

Pursuant to this statutory scheme, the Planning Commission considered and approved the Van Cott application for a planned development covering the subject property. Pursuant to the Zoning Ordinance, Van Cott submitted its application for a planned development on its property. (R. 16.) The Planning Commission's staff then reviewed the Van Cott application and made its recommendation to the Planning Commission for approval. (R. 205-16.) As required by S.L.C. Code § 21A.54.150, the Planning Commission made the specific requisite findings in approving the Van Cott application for a planned development. (R. 288-90.) The Planning Commission made the following findings:

Findings – Standards for Conditional Use

1. A Planned Development is allowed as a Conditional Use in this zone.
2. The proposed development is in harmony with the general purposes and intent of the Standards for Conditional Use and is compatible with and implements the planning goals and objectives of the City, including applicable City master plans. It is not impossible from a geological standpoint or of a geologic concern to build on this slope

and, in fact, it is found that the development, if built as engineered by Bill Gordon, will increase the geologic stability of a portion of the area.

3. Streets or other means of access to the proposed development are suitable and adequate to carry anticipated traffic and will not materially degrade the service level on the adjacent streets.
4. The internal circulation system of the proposed development is properly designed. The visitor parking stalls shall be increased to three for this six-unit development.
5. Existing and proposed utilities are or will be adequate for the proposed development and will not have an adverse impact to adjacent land uses or resources.
6. Appropriate buffering is provided to protect adjacent land uses from light, noise, and visual impacts, and responsibility will be delegated to the Planning Director to assure that the necessary buffering occurs.
7. Architecture and building materials are consistent with the development and compatible with the adjacent neighborhood, and responsibility will be delegated to the Planning Director to work with the architect to assure that materials are compatible.
8. Landscaping is appropriate for the scale of the development, and responsibility will be delegated to the Planning Director to assure that it is appropriate.
9. The proposed development is compatible with the surrounding neighborhood and will not have a material net cumulative adverse impact on the neighborhood or the City as a whole.
10. The proposed development complies with all other applicable codes and ordinances.

Findings – Planned Development

The Planning Commission finds that the following standards of the Planned Development section of the Zoning Ordinance will be met:

1. Creation of a more desirable environment than would be possible through strict application of the other City land use regulations.
2. Promotion of a creative approach to the use of land and related physical facilities resulting in better design and development, including aesthetic amenities.
3. Combination and coordination of architectural styles, building forms, and building relationships.

4. Preservation and enhancement of desirable site characteristics such as natural topography, vegetation and geologic features, and the prevention of soil erosion.
5. Use of design, landscape or architectural features to create a pleasing environment.
6. Inclusion of special development amenities.

(R. 288-90.)

As part of the approval process for Van Cott's planned development application, the Planning Commission addressed the need to change, alter, modify or waive the street frontage requirement imposed within this zoning district. The Planning Commission made the specific findings required of S.L.C. Code § 21A.54.150(C): "No such change, alteration, modification or waiver shall be approved unless the Planning Commission shall find that the proposed planned development: 1. Will achieve the purposes for which a planned development may be approved pursuant to subsection A of this section; and 2. Will not violate the general purposes, goals and objectives of this title and of any plans adopted by the planning commission or the city council." Id. As set forth above, the findings regarding Subsection A were discussed in the Planning Commission Staff Report and adopted by the Planning Commission. (R. 215-16, 288-90.) With respect to the second necessary finding that approval will not violate the general purposes, goals and objectives of this Title and of any plans adopted by the Planning Commission or the City Council, the Planning Commission plainly made these findings as well: "The proposed development is in harmony with the general purposes and intent of the Standards for Conditional Uses and is compatible with and implements the planning goals of the City, including applicable City master plans." (R. 288-89.)

Moreover, the Van Cott property plainly falls within the definition of a planned development under the Salt Lake City Ordinance. Although Donner Crest argues that "by no stretch of the imagination is the Van Cott Property even a valid candidate for a PUD," Donner Crest has no direct authority for its position. Br. of Appellant p. 30. Instead, they explain that PUDs are "on acreage of certain minimum size, usually large enough to constitute a new community." Br. of Appellants at 30-31 (citing Saunders v. Sharp, 793 P.2d 927, 928 n.2 (Utah App. 1990)). Donner Crest attempts to mount this argument based on citation to a footnote in one case[1] and one phrase in a treatise.

But without needing to look further, the Salt Lake City Zoning Ordinance specifically allows for a planned development to be built in the RMF-45 district on a parcel as small as twenty thousand (20,000) square feet. S.L.C. Code § 21A.54.150, *Table E2, available at Br. of Appellants, App. –1, pp. 10-11.* The Van Cott parcel is approximately 1.2 acres, more than twice the minimum required area for a planned development in the RMF-45 district.[2] (R. 2). Accordingly, the Van Cott parcel is, by statute, sufficiently large to accommodate a planned development in the district.

Finally, Donner Crest attempts to argue that, in essence, the Planning Commission's approval of the Van Cott planned development is illegal spot zoning. Spot zoning, as defined by the Zoning Ordinance, is "the process of singling out a small parcel

---

[1] In fact, the footnote cited by Donner Crest gives a Vermont court's 23-year-old definition of planned unit development. See Saunders, 793 P.2d at 929 n.2 (citing Stevens v. Essex Junction Zoning Bd., 428 A.2d 1100, 1103 (Vt. 1981)).

[2] An acre is widely understood to be "[a]n area of land measuring 43,560 square feet." Black's Law Dictionary 24 (7th Ed. 1999). As such, Van Cott's 1.2 acre parcel would measure approximately 52,272 square feet.

of land for a *use classification materially different and inconsistent with the surrounding area* and the adopted city master plan, for the sole benefit of the owner of that property and to the detriment of the rights of other property owners." S.L.C. Code § 21A.62.040 (emphasis added). The Van Cott Parcel does not qualify within the Zoning Ordinance's definition of spot zoning. As defined by Utah courts:

> Spot zoning results in the creation of two types of "islands." One type results when the zoning authority improperly limits the use which may be made of a small parcel located in the center of an unrestricted area. The second type of "island" results when most of a large district is devoted to a limited or restricted use, but additional uses are permitted in one or more spots in the district.

Crestview-Holladay Homeowners Association, Inc. v. Engh Floral Co., 545 P.2d 1150, 1151 (Utah 1976) (citing Wilkins v. City of San Bernardino, 175 P.2d 542 (Cal. 1946)). Presumably, Donner Crest argues that the second type of "island" was granted to Van Cott. In either case, the plain reality is that neither "island" was created in this case. Van Cott's proposed project is a multi-family planned development, located in a multi-family district. Its uses is identical to the surrounding uses. No spot zoning has occurred in this case.

It appears that not only Van Cott and the Planning Commission, but also the authors of the leading Utah real property law treatise, cited by Donner Crest, understand the planned development process to allow a planning commission to modify the requirements of the zoning ordinance. As explained by Professors Thomas and Backman, "[i]f a PUD proposal is accepted by the local planning commission, greater creativity in development is possible since the housing project will not be bound by the

requirements contained in the subdivision ordinances." David A. Thomas & James H. Backman, Thomas and Backman on Utah Real Property Law, § 4.04(a), p. 173 (1999).

And *this* is exactly what happened here. Van Cott, understanding that the unique features of its parcel would require creativity to develop, sought approval from the Planning Commission for a planned development conditional use permit, in accordance with the requirements and procedures of the Zoning Ordinance. The Planning Commission found the proposal acceptable, and approved Van Cott's application.

The Planning Commission did not merely waive the frontage requirement for the Van Cott parcel. It made its approval of the project conditional on compliance by Van Cott with many requirements which otherwise would not have been imposed:

(1) Compliance with all departmental comments and the recommendations;
(2) Compliance with the geotechnical report as submitted by AMEC Earth & Environmental, Inc., dated September 28, 2001, including additional pre-construction testing as recommended;
(3) That a detailed landscape plan be submitted to the Planning Department outlining the areas of vegetation preservation, delegating final approval to the Planning Director, with special emphasis on creating buffering for the neighboring projects, especially the pool area;
(4) That final plat and development approval authority be granted to the Planning Director;
(5) Future Administrative consideration for condominium approval;
(6) Consistent with the plans of the contractor, no staging be allowed in the [Donner] circle area;
(7) Approval is subject to the opinion of the City Attorney that the lot is a legally subdivided lot or, in the alternative, that before the applicant can build, they must obtain appropriate subdivision and platting approval;[3]
(8) That a snow removal plan be submitted that will not impinge upon adjoining properties or the natural habitat or the natural stream channel, nor require exporting snow off the property;

[3] Note that the City Attorney did issue an opinion letter on August 8, 2002, stating that the lot is legally subdivided. R. 37-38.

(9) That on site visitor parking stalls be increased to three stalls for this six unit development;
(10) Architecture and building materials must be compatible with the adjacent neighborhood and the Planning Commission delegates responsibility to the Planning Director to assure that the design and materials are compatible; and
(11) This project must be designed and built as engineered by Bill Gordon and as described in the hearing by Chuck Culp.

(R. 290.) Clearly, the Van Cott project was subjected to the rigors of Planning Commission review. Its planned development conditional use permit was approved, but approval was made contingent upon compliance with all of the above-listed requirements.

The Planning Commission acted pursuant to powers delegated to it by the City Council in approving the Van Cott planned development application, which included a waiver of the frontage requirement. Salt Lake City delegated that power to the Planning Commission to make that decision pursuant to the Act. The Planning Commission lawfully acted within its properly delegated powers and granted the Van Cott planned development application in accordance with state law and Salt Lake City ordinances. Accordingly, the decision of the Planning Commission, the Land Use Appeals board and the Third Judicial District Court should be upheld by this Court. Donner Crest's appeal should be denied and the decisions below affirmed.

C. VAN COTT WAS NOT REQUIRED TO OBTAIN A VARIANCE FROM THE BOARD OF ADJUSTMENT.

Van Cott was not required to obtain a variance from the Board of Adjustment for approval of its planned development which did not have the frontage requirement otherwise applicable in that zoning district. As set forth above, a planned development is part of the comprehensive zoning ordinance passed by Salt Lake City. The planned

development is specifically provided for in the zoning ordinance. A conditional use is not outside of the zoning ordinance – it is an express part of the zoning ordinance. The planned development application submitted by Van Cott made application pursuant to the specific zoning provisions allowing for a planned development. Again, and as set forth above, the Planning Commission specifically followed and approved the application in accordance with the state Act and the Salt Lake City zoning ordinances.

A variance, on the other hand, specifically contemplates a waiver of or modification of an enacted zoning ordinance:

> Any person or entity desiring a waiver or a modification of the requirements of the zoning ordinances applied to a parcel of property owned, leases, or in which he holds some other beneficial interest may apply to the Board of Adjustment for a variance from the terms of the zoning ordinance.

Utah Code Ann. § 10-9-707. The specific purpose of the variance is to allow something which is not authorized by the comprehensive zoning ordinance. Id. For example, had Van Cott not proceeded as a planned development, Van Cott would have had to apply for a variance in order to gain development approval. Because the planned development ordinance specifically allowed for a waiver of the frontage requirement as part of the planned development statutory scheme, no variance of the frontage requirement was required. In essence, the frontage requirement was written out of the zoning requirements for the Van Cott planned development project. As argued above, the City Council had the authority to and did grant to the Planning Commission the authority and powers to amend or modify the zoning ordinances for any particular planned development, provided specific findings were made. Because the specific findings were

made, the frontage requirement no longer applied to the Van Cott planned development and, thus, no variance was required.

Van Cott applied for a use specifically authorized by the zoning code. Van Cott did not seek to circumvent the requirements of the zoning ordinance and, as such, a variance plainly was not the proper avenue to seek approval of the proposed development. Because a planned development specifically allowed the Van Cott development as proposed and the Planning Commission had the authority to review, hear and decide an application for a planned development, the granting of that conditional use by the Planning Commission was proper as a matter of law.

VII. CONCLUSION

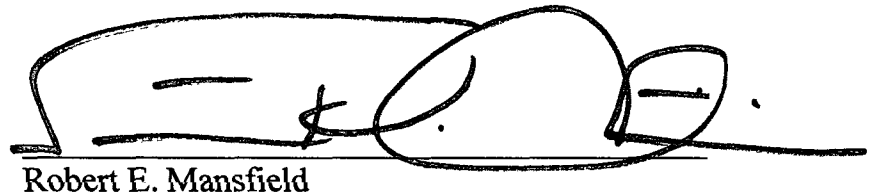
For the foregoing reasons, the decision of the District Court affirming the decision of the Land Use Appeals Board affirming the decision of the Planning Commission should be affirmed by this Court. The Planning Commission acted within its statutorily granted powers in approving the Van Cott planned development application. The Planning Commission made the requisite findings in approving the Van Cott application for a planned development. Because Van Cott did not seek to circumvent the Zoning Ordinances, Van Cott did not need to seek a variance. Consequently, this Court should affirm.

Because the facts and legal arguments are adequately presented in the briefs and record; because the decisional process would not be significantly aided by oral argument; and because the arguments raised by Donner Crest do not merit significant additional

time and resources spent by this Court and the litigants, Van Cott respectfully submits that this case should be decided on the briefs without the need for a hearing.[4]

DATED this 14th day of September, 2004.

VAN COTT, BAGLEY, CORNWALL & MCCARTHY



Robert E. Mansfield
Stephen K. Christiansen
Attorneys for Appellees

[4] See Utah R. App. 29(a).

CERTIFICATE OF SERVICE

I hereby certify that I caused two (2) true and correct copies of the within and foregoing BRIEF OF APPELLEE to be mailed, postage prepaid, this 14th day of September, 2004, to the following counsel of record:

Alexander Dushku
Kirton & McConkie
60 East South Temple, Suite 1800
P.O. Box 45120
Salt Lake City, Utah 84145-0120

Gregory M. Simonsen
Jason K. Nelson
Rinehart, Simonsen & Fetzer
4 Trial Center
305 West North Temple, Suite 800
Salt Lake City, Utah 84180

Lynn H. Pace
Salt Lake City Law Department
451 South State Street, Suite 505A
Salt Lake City, Utah 84111